UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

IN RE HOLOCAUST VICTIM ASSETS LITIGATION,

Fee Application of Burt Neuborne

CV-06-983(FB)(JO)
CV-96-4849 (ERK)(JO)
Consolidated with:
CV 99-5161 and CV 97-0461

Notice of Objection to Report and Recommendation of Magistrate Judge

Pursuant to Rule 72(b) FRCP, petitioner conditionally objects to so much of the Report and Recommendation of Magistrate Judge James Orenstein as declined to award petitioner attorneys' fees calculated at the fair market value of petitioner's services.

In calculating the lodestar fee payable to petitioner, Magistrate Judge Orenstein declined to utilize the fair market value of petitioner's services, which the record conclusively establishes to be $700 per hour. In place of the fair market rate, the Magistrate Judge substituted a figure of $450 per hour derived from a hypothetical negotiation between petitioner and the presiding Judge that concededly never took place. In fact, Magistrate Judge Orenstein found that the Court had agreed that "reasonable" hourly rates would be payable. With respect, in this Circuit, unless otherwise specified, the term "reasonable" is a term of art that looks to the relevant market to set the value of attorney services. An agreement to pay "reasonable" attorneys' fees is simply an agreement to pay fair market rates. Indeed, the term "reasonable" appears repeatedly in the fee decisions of the U.S. Supreme Court and this Circuit as the very definition of market rates. *See, e.g., Blum v. Stenson,* 465 U.S. 886, 896 n. 11 (1984) (establishing that

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rates "prevailing in the community" are the benchmark for calculating the reasonable hourly rate component of the lodestar); *Cruz v. Local Union No. 3*, 34 F.3d 1148, 1159 (2d Cir.1994) (applying *Blum* in NLRA context); *Miele v. New York State Teamsters Pension & Retirement Fund*, 831 F.2d 407, 408-09 (2d Cir. 1987) (using market rates to define reasonable fee award under ERISA fee shifting provisions). By basing attorneys' fees not on what the market pays but on what might have been the result of some hypothetical bargain that never transpired, Magistrate Judge Orenstein unfortunately departed from the mimic-the-market rationale that is supposed to underlie fee awards and substituted a chancellor's-foot award that is both unpredictable and impressionistic.

Moreover, even if one accepts the Magistrate Judge's analysis of the appropriate "reasonable" hourly rate, he places that rate between a low of $450 and a high of $600 per hour, and then awards the lowest rate, despite acknowledging that petitioner's work had actually increased the settlement fund by at least $20 million, and was of extremely high quality, deserving of an excellence multiplier. In light of the suppressed hourly rate, the refusal to enhance the fee award either for the additional funds received or for the excellence of representation compounds the legal error. Accordingly, in declining to award a lodestar that even approximates the fair market value of petitioners more than 6,800 hours of devoted service to the settlement classes, the Report and Recommendation of the Magistrate Judge is legally flawed.

Despite its legal flaws, however, petitioner acknowledges the thoughtfulness and wisdom of the Magistrate Judge's Report and Recommendation, which seeks to achieve an equitable resolution of this unseemly dispute over fees. Accordingly, if the objectors are prepared to accept the Magistrate Judge's Report and Recommendation, petitioner is prepared to waive all legal objections to the Report, and accept it as well. If, however, the objectors choose to continue to interpose baseless legal objections to the Report, petitioner has no choice but to defend his legal rights by reluctantly interposing this objection. Nonetheless, petitioner does not now seek and has not been seeking a fee award in excess of the original fee application. It is only this ongoing and dispiriting fee dispute that forces petitioner to seek to protect his legal interests by reliance on the well-established attorneys' fees law of this Court and this Circuit.

March 29, 2007
New York, New York

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CERTIFICATE OF SERVICE

I, Rishi Bhandari, hereby certify that on March 29, 2007, I caused a copy of the Notice of Objection to Report and Recommendation of Magistrate Judge, to be served electronically upon:

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Objector

By: s/ Rishi Bhandari
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